

**HOGAN & HARTSON**  
L.L.P.

**ORIGINAL**

LINDA L. OLIVER  
PARTNER  
DIRECT DIAL (202) 637-6527

September 3, 1999

**EX PARTE OR LATE FILED**

COLUMBIA SQUARE  
555 THIRTEENTH STREET, NW  
WASHINGTON, DC 20004-1109  
TEL (202) 637-5600  
FAX (202) 637-5910

**BY HAND DELIVERY**

Ms. Magalie R. Salas  
Secretary  
Federal Communications Commission  
The Portals  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**RECEIVED**

SEP 03 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Notice of Ex Parte Communication Regarding Interconnection  
and Resale Obligations Pertaining to Commercial Mobile  
Radio Services, CC Docket No. 94-54**

Dear Ms. Salas:

Yesterday, on behalf of the Telecommunications Resellers Association ("TRA"), the undersigned of Hogan and Hartson L.L.P. had a telephone discussion with Adam Krinsky, Legal Advisor to Commissioner Gloria Tristani, regarding the referenced proceeding. Today, the undersigned and David Gusky, Executive Vice President of TRA, participated in a second telephone discussion with Mr. Krinsky on the same subject.

In the conversations, TRA discussed the importance of Commission enforcement of the current wireless resale obligation, including the need for "rocket docket" or similar treatment of complaints from wireless resellers. TRA also emphasized the importance of access by wireless resellers to billing information in an electronic format. As TRA pointed out, failure to provide such information constitutes an indirect restriction on resale. TRA also pointed out that Sections 201(b) and 202(a) of the Act, 47 U.S.C. §§ 201(b), 202(a), require CMRS providers to deal with resellers on a reasonable and nondiscriminatory basis. TRA also discussed the need to preserve the current right to resell bundled offerings of customer premises equipment (CPE) and wireless service.

The attached May 24, 1999, letter from David Gusky to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, and the attached materials on resale of CPE/service bundles, were also discussed during the telephone conversations.

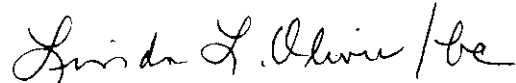
No. of Copies rec'd 012  
List ABCDE

HOGAN & HARTSON L.L.P.  
Magalie R. Salas  
September 3, 1999  
Page 2

I have hereby submitted two copies of this notice for each of the referenced proceedings to the Secretary, as required by the Commission's rules. Please return a date-stamped copy of the enclosed (copy provided).

Please contact the undersigned if you have any questions.

Respectfully submitted,

A handwritten signature in cursive script, reading "Linda L. Oliver /be".

Linda L. Oliver  
Counsel for Telecommunications  
Resellers Association

Enclosure

cc: Adam Krinsky



Telecommunications  
Resellers  
Association

1401 K Street, N.W.  
Suite 600  
Washington, D.C. 20005

Tel: (202) 835-9898  
Fax: (202) 835-9893

May 24, 1999

***BY HAND DELIVERY***

Thomas Sugrue  
Chief, Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: Interconnection and Resale Obligations Pertaining to  
Commercial Mobile Radio Services, CC Docket No. 94-54**

Dear Mr. Sugrue:

On behalf of the Telecommunications Resellers Association ("TRA"), I am writing to underscore TRA's views regarding the CMRS resale rule and the FCC's scheduled sunset of that requirement.

It is critical that the Commission reject any efforts to limit or eliminate the applicability of the wireless resale requirement. Many CMRS providers continue to resist fulfilling their legal obligation to permit unrestricted resale of their services. Discriminatory treatment of wireless resellers is still common, despite the growth of PCS and SMR competition. The FCC must make it clear to the wireless industry that the resale rule will continue in effect and that the FCC is prepared to enforce the rule strictly.

TRA urges the Commission to make the following specific points in its reconsideration order in the referenced proceeding:

1. Review of Market Conditions Prior to Sunset. TRA believes that the Commission's decision to sunset the resale requirement is unlawful and that the sunset should be eliminated. At a minimum, however, the Commission should promise to re-examine competitive conditions in the wireless market *before* allowing any sunset to take place. This

is the approach that the Commission took in the LMDS context. 1/ Even PCIA, the PCS industry association, agrees that the CMRS market is far from competitive today. 2/ Unless and until the Commission can determine that resale is freely available and that discrimination against wireless resellers is unlikely to take place (a determination it could not make today), the Commission cannot lawfully eliminate the resale obligation.

---

1/ In the LMDS proceeding, the Commission said that it would re-evaluate the level of competition in the LMDS market before permitting the scheduled sunset of the eligibility restrictions on ILEC and cable company ownership of in-region LMDS licenses. Specifically, the Commission stated that it would need to conduct a study "examining whether 'there [has been] sufficient entry and increases in competition in the markets at issue . . . for us to be able to sunset the restrictions on incumbent LECs and cable companies.'" Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, Third Order on Reconsideration, CC Docket No. 92-297, FCC 98-15 (rel. Feb. 11, 1998), at ¶ 113, quoting Second Report and Order in CC Docket No. 92-297, 12 FCC Rcd 12545, 12633 (para. 198). See also id. at ¶ 112.

2/ In its reply comments in the commercial mobile radio services (CMRS) spectrum cap proceeding, PCIA opposed lifting the spectrum cap, citing data showing that the PCS share of the wireless market is still relatively low, and arguing that the CMRS market is still "extraordinarily concentrated." See Reply Comments of the Personal Communications Industry Association (PCIA) in 1998 Biennial Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, et al., filed Feb. 10, 1999, at 8 (copy placed in record of CC Docket 94-54 on March 17, 1999). PCIA's own data show that the FCC's decision to sunset the wireless resale requirement, which was based on predictions of the effect of the introduction of PCS on the competitiveness of the wireless market, was not well-founded.

Thomas Sugrue

May 24, 1999

Page 3

2. Access to Electronic Billing Information. Access to electronic billing information is essential, as a practical matter, to enable resellers to generate their own bills for their retail customers. The Commission should declare that a refusal to provide reseller customers with access to billing information in an electronic format constitutes an unlawful indirect restriction on resale, in those instances in which the carrier has the capability to provide the information in that format.
3. Application of Rocket Docket Procedures to Wireless Resale Complaints. The Commission should declare that accelerated docket procedures will apply to complaints alleging noncompliance with the wireless resale requirement. This will send the strong signal that the Commission will not tolerate carrier resistance to reseller requests for service.
4. Resale of Wireless/CPE Bundled Offerings. The Commission should keep in place the longstanding requirement that CMRS providers must permit resellers to resell bundled offerings of wireless service and equipment. In the absence of such a requirement, carriers could use the bundle as a means to provide effective discounts in service that would be unavailable to resellers. If the Commission does eliminate the resale requirement for bundled offerings, it should, at a minimum, clearly reaffirm that the airtime portion of the bundle be available for resale.
5. No Market-by-Market Elimination of the Resale Requirement. The Commission should not open the door to the filing of forbearance petitions on a market-by-market basis. The arrival of additional competitors in the wireless market has not changed the incentives or behavior of wireless carriers (including new entrants) toward their reseller customers. Furthermore, any attempt to evaluate the need for a resale requirement in a particular market would exhaust the Commission's resources. There is no bright line test that could lawfully be applied to justify forbearance on a market-by market basis.

Thomas Sugrue  
May 24, 1999  
Page 4

TRA urges the Commission to clarify the above points in its reconsideration order. Please give me a call if you have any questions about the above points or would like to discuss these issues further.

Sincerely yours,

A handwritten signature in cursive script that reads "David Gusky" followed by a date "5/26/99".

David Gusky  
Executive Vice President

cc: Magalie R. Salas, Secretary  
Ari Fitzgerald  
Peter Tenhula  
Dan Connors  
Kevin Martin  
Karen Gulick  
Diane Cornell  
Jim Schlichting  
Nancy Boocker  
Jeanine Poltronieri  
Walter Strack  
Jane Phillips

# **Telecommunications Resellers Association**

**April 1999**  
**CC Docket No. 94-54**

**Why Resale of Bundled Offerings of  
CPE and Wireless Service  
Must Remain Unrestricted**

The Commission correctly held in the CMRS Resale Order that carriers should not be allowed to circumvent the resale requirement by denying resellers the ability to resell a package of wireless service and equipment. 1/

Under the resale rule, 47 C.F.R. § 20.12(b), resellers are entitled to “unrestricted resale” of any CMRS service, including services that are discounted through bundled offerings.

In its 1992 order creating a wireless exception to its general prohibition on bundling of basic service and CPE, the FCC noted that resale of bundled offerings could not be restricted. 2/

---

1/ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, FCC 96-263, released July 12, 1996, at ¶ 31, 11 FCC Rcd 18455 (1996).

2/ Bundling of Cellular Customer Premises Equipment and Cellular Service, CC Docket No. 91-34, 7 FCC Rcd 4028, 4032 n.48 (1992) (“Any restrictions on resellers’ ability to buy packages of CPE and service on the same basis as other customer[s] would be unlawful.”)



Denying reseller customers the ability to purchase a bundled offering constitutes

- the denial of a reasonable request for service in violation of Section 201(b) and
- discrimination against reseller customers in violation of Section 202(a). 47 U.S.C. §§ 201(b), 202(a).

Communications services increasingly are being sold in bundle-priced packages with other products, some of which may not themselves be subject to Title II. 3/

Standard practice in the wireless industry is to sell wireless phones at deeply discounted rates when the phones are purchased with wireless service. 4/

- This practice, while permitted under FCC rules for wireless services, enables the carrier effectively to discount the *service* when it is sold in a bundle with equipment.
- The bundled price *disguises* the discounting of the service price.

---

3/ See, e.g., "Bundling Still a Mixed Bag," RCR, Jan. 18, 1999. Bundled pricing is commonly defined as offering of two or more products at a packaged rate that is lower than the price that would be paid if the components were purchased separately. See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket Nos. 96-61, 98-163, FCC 98-258, released October 9, 1998, at ¶ 1.

4/ Except in the case of wireless services, it is still unlawful to bundle telecommunications services with equipment. The Commission is considering whether to eliminate the general prohibition on bundling of common carrier services with CPE and enhanced services. See id.

This discounted wireless service should be available for resale, through *resale of the bundle*.

Or, if the carrier prefers, the discounted service can be provided by offering resellers service (without CPE) *at the effective discount* reflected in the bundled offering.

The fact that CPE standing alone is not a Title II offering, or that CPE is competitive, is irrelevant to whether the bundle should be available to resellers.

- In the CMRS Resale Order, the Commission did *not* hold that the non-common carrier products themselves must be available for resale.
- Resellers are like any other customer, and cannot lawfully be denied the ability to purchase service, whether it is offered on a stand-alone basis or bundled with CPE.
- Carriers cannot use bundling as an excuse to discriminate against resellers.

The fact that a reseller may be able to purchase the CPE from another source also is irrelevant to the requirement to permit resale of the bundle.

- The problem with bundling is not the lack of availability of CPE.
- Rather, the issue is that wireless service is being effectively discounted through the bundle, and that service discount is not available to reseller customers.

The Commission did not prohibit bundling of wireless service with CPE; it only required carriers to refrain from denying resellers the ability to purchase bundled as well as stand-alone service offerings.

The Commission simply was recognizing that when a Title II common carrier service is bundled with a non-Title II offering, carriers can employ the bundled pricing as a means of denying to resellers the most favorable retail rate.

The implications of eliminating the requirement that bundles be made available for resale would be profound.

Full service packages are likely to become the rule in the marketplace.

- By definition, the components of the package will be more expensive, standing alone, than they will be when purchased as a bundle.
- Thus, the lowest effective rates for service will be those available in bundled offerings.
- If those bundles are not available for resale, resellers will be left with the ability only to resell the highest priced, least discounted offerings.

If resale becomes nonviable as a practical matter, then only those service providers that own networks will be in a position to compete in a full service world.